Ibrahim bin Mahd Nazri v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-09(H)-186–08 OF 2023, A-09(H)-187–08 OF 2023, A-09(H)-188–08 OF 2023 AND A-09(H)-189–08 OF 2023
HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
13 JUNE 2024

Criminal Procedure — Sentence — Appeal against sentence — Charges under s 14(a) and (d) and s 15 (a)(ii) read together with s 16 of the Sexual Offences Against Children Act 2017 — Sexual offence against two children — Whether accused understood understood nature and consequences of guilty plea — Whether sentence of 20 years imprisonment imposed had crushing effect on accused — Whether number of whippings imposed according law — Whether sentence proportional to offence — Whether severity of offence outweighed needs and interest of accused — Whether offences committed separate and distinct — Whether one transaction rule applicable — Whether sentences should be made to run consecutively

The appellant was charged in the sessions court with seven counts, six offences under ss 14(a) and (d) read together with s 16 of the Sexual Offences Against Children Act 2017 and one offence under 15(a)(ii) read together with s 16 of the same Act ('the SOACA') involving a victim who was 14 years of age, under Criminal Case No AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022 and AA-62JSK-49–06 of 2022. The appellant was also charged in the same court with three counts, offences under s 14(d) read together with s 16 of the SOACA involving another victim who was 11 years of age, under Criminal Case No AA-62JSK-50–06 of 2022. Both the victims were sisters, and all the cases were tried together. Upon the ten charges being read to the appellant, he pleaded guilty to all the charges and was accordingly convicted. After hearing the mitigation, the sessions court judge ('SCJ') imposed the sentence of eight years imprisonment from the date of arrest with one stroke of whipping and three years supervision and, an additional two-year imprisonment and two strokes of whipping, respectively for all the ten charges. The sentences for all the charges in cases AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022 and AA-62JSK-49–06 of 2022 were ordered to run concurrently from the date of arrest. While the sentences for the three charges in cases AA-62JSK-50–06 of 2022 were ordered to run concurrently after the sentences in cases AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022, and AA-62JSK-49–06 of 2022 were served. Dissatisfied, the appellant filed two separate notices of appeal against the sentence and conviction to the High Court. The judicial

commissioner ('JC') having heard these appeals together: (a) dismissed the appellant's appeal against conviction; (b) set aside the sentence of whipping in respect of the second charge for the offence under s 15(a)(ii) of the SOACA in case AA-62JSK-49–06 of 2022; (c) reduced the sentence of the said charge of the same case to three years imprisonment; (d) affirmed the sentence of imprisonment in respect of all other cases; and (e) maintained the order of the sessions court as to how the sentence of imprisonment should be carried out. Aggrieved, the appellant filed the present appeal against the sentence imposed.

Held, dismissing the appeal, affirming the conviction and sentence of High Court:

(1) The appellant understood the nature and consequences of his guilty plea. There was no evidence of the appellant making any form of qualified admission to the commission of the offence or any evidence that may impair the plea of guilt. Everything that took place before the lower court was in accordance with the procedure and principles whereby: (a) the accused intended to plead guilty; (b) accused understood the true nature of the plea and the consequences; and (c) the accused intended to submit to the offence without qualification. Therefore, there was no justification to disturb his decision (see para 15).

(2) The sentence imposed by the JC was not manifestly excessive or inadequate and was proportional to the commission of the beastly act by the appellant on the children. Considering the alarming increase of sexual offences against children, deterrence had to be the sole aim. Sentence passed shall be deterrent to the appellant specifically so that he would not re-offend and likewise it had to be a clear message to would be offenders, to be deterred from committing such crimes (see paras 18).

(3) The total of 20 years imprisonment did not go against the totality principle because the maximum sentence that could be imposed for all the ten offences was 200 years. The rationale given by the SCJ was that the court must show its abhorrence to the rampancy of crimes of a sexual nature committed against children and therefore, a deterrent sentence was warranted. The facts and circumstances of the case did not justify a shorter term of imprisonment nor was it fit to impose concurrent sentences. These were very serious and heinous crimes (see para 33).

(4) The charges in cases AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022 and AA-62JSK-49–06 of 2022 were distinct from the charges in AA-62JSK-50–06 of 2022. The time, place of incidents and victims were different. There was no proximity of time nor proximity of place and no continuity of action nor purpose or design. For this reason, the one transaction rule would not apply. As the offences committed were separate and distinct, the sentences should be made to run consecutively (see para 34).

(5) On the issue of the appellant's complaint that the total imprisonment of 20 years imprisonment would have a crushing on the appellant, the seriousness of the offences committed and the demand of protection of the public interest forfeited the interest of the appellant. The offences committed by the appellant warranted a lengthy imprisonment sentence. As regards the sentence of whipping, notwithstanding a total number of 30 strokes were imposed on the appellant and by virtue of s 288(5) of the Criminal Procedure Code ('CPC'), the appellant being a male adult of 41 years old was subjected to be whipped up to a statutory maximum of 24 strokes only. The JC had set aside the sentence of whipping imposed in respect of the charge under s 15(a)(ii) of the SOACA. The remaining number of whippings was 27 strokes. The court would not vary the 27 strokes meted out by the JC. However, in executing the whipping sentence, the prison authority would have to cap the number of strokes to 24 only to bring it within the limit mandated by the CPC (see paras 38, 41 & 43).

[Bahasa Malaysia summary

Perayu dituduh di mahkamah sesyen dengan tujuh pertuduhan, enam kesalahan di bawah seksyen 14(a) dan (d) yang dibaca bersama seksyen 16 Akta Kesalahan Seksual Terhadap Kanak-kanak 2017 dan satu kesalahan di bawah s 15(a)(ii) yang dibaca bersama seksyen 16 Akta yang sama ('AKSTKK') melibatkan mangsa yang berumur 14 tahun, yang didaftarkan di bawah Kes Jenayah No AA-62JSK-47–06 Tahun 2022, AA-62JSK-48–06 Tahun 2022 dan AA-62JSK-49–06 Tahun 2022. Perayu juga dituduh di mahkamah yang sama dengan tiga pertuduhan, kesalahan di bawah s 14(d) yang dibaca bersama s 16 AKSTKK melibatkan mangsa lain yang berumur 11 tahun, di bawah Kes Jenayah No AA-62JSK-50–06 Tahun 2022. Kedua-dua mangsa adalah adik beradik dan dibicarakan bersama. Setelah sepuluh pertuduhan dibacakan kepada perayu, dia mengaku bersalah terhadap semua pertuduhan dan disabitkan. Selepas mendengar hujahan mitigasi, hakim mahkamah sesyen ('HMS') menjatuhkan hukuman penjara lapan tahun dari tarikh tangkap dengan satu sebatan dan tiga tahun pengawasan dan, tambahan penjara dua tahun dan dua sebatan, masing-masing untuk kesemua sepuluh pertuduhan. Hukuman bagi semua pertuduhan di dalam kes AA-62JSK-47–06 Tahun 2022, AA-62JSK-48–06 Tahun 2022 dan AA-62JSK-49–06 Tahun 2022 diperintahkan berjalan serentak dari tarikh tangkap. Manakala hukuman bagi tiga pertuduhan di bawah kes AA-62JSK-50–06 Tahun 2022 diperintahkan berjalan serentak selepas hukuman untuk kes AA-62JSK-47–06 Tahun 2022, AA-62JSK-48–06 Tahun 2022, dan AA-62JSK-49–06 Tahun 2022 dilaksanakan. Tidak berpuas hati, perayu memfailkan dua notis rayuan berasingan terhadap hukuman dan sabitan tersebut kepada Mahkamah Tinggi. Pesuruhjaya kehakiman ('PK') setelah mendengar rayuan-rayuan ini: (a) menolak rayuan perayu terhadap sabitan; (b) mengenepikan hukuman sebatan untuk pertuduhan kedua bagi kesalahan di bawah s 15(a)(ii) AKSTKK

di dalam kes AA-62JSK-49–06 Tahun 2022; (c) mengurangkan hukuman pertuduhan tersebut bagi kes yang sama kepada tiga tahun penjara; (d) mengekalkan hukuman penjara untuk semua kes lain; dan (e) mengekalkan perintah mahkamah sesyen tentang cara hukuman penjara dilaksanakan. Tidak berpuas hati, perayu memfailkan rayuan ini terhadap hukuman tersebut.

Diputuskan, menolak rayuan, mengekalkan sabitan dan hukuman Mahkamah Tinggi:

(1) Perayu memahami sifat dan akibat pengakuan bersalahnya. Tiada keterangan yang menunjukkan perayu membuat sebarang pengakuan bersyarat yang boleh menjejaskan pengakuan bersalah. Prosiding di hadapan mahkamah rendah adalah mengikut prosedur dan prinsip di mana: (a) tertuduh berhasrat untuk mengaku bersalah; (b) tertuduh memahami sifat sebenar pengakuan dan akibatnya; dan (c) tertuduh berhasrat untuk mengakui pertuduhan itu tanpa syarat. Oleh itu, tiada justifikasi untuk mengganggu keputusan mahkamah bawahan (lihat perenggan 18).

(2) Hukuman yang dijatuhkan oleh PK tidak berlebihan atau tidak mencukupi dan bersesuaian dengan perlakuan jahat perayu ke atas kanak-kanak. Memandangkan terdapat peningkatan kes kesalahan seksual terhadap kanak-kanak yang membimbangkan, pencegahan harus menjadi matlamat utama. Hukuman yang dijatuhkan menghalang perayu secara khusus supaya tidak melakukan kesalahan itu lagi dan harus menjadi mesej yang jelas kepada pesalah lain untuk tidak melakukan jenayah sedemikian (lihat perenggan 18).

(3) Jumlah hukuman penjara 20 tahun itu tidak bertentangan dengan prinsip keseluruhan kerana hukuman maksimum yang boleh dikenakan bagi kesemua sepuluh kesalahan itu adalah 200 tahun. Alasan yang diberikan oleh HMS ialah mahkamah haruslah menunjukkan ketegasan untuk membanteras jenayah seksual yang dilakukan terhadap kanak-kanak secara berleluasan. Oleh itu, hukuman pencegahan adalah wajar. Fakta dan keadaan kes tidak mewajarkan tempoh penjara yang lebih pendek dan juga tidak sesuai untuk tertuduh dijatuhkan hukuman secara serentak. Ini adalah jenayah yang sangat serius dan keji (lihat perenggan 33).

(4) Pertuduhan-pertuduhan di dalam kes AA-62JSK-47–06 Tahun 2022, AA-62JSK-48–06 Tahun 2022 dan AA-62JSK-49–06 Tahun 2022 adalah berbeza dengan pertuduhan dalam kes AA-62JSK-50–06 Tahun 2022. Masa, tempat kejadian dan mangsa adalah berbeza. Tiada kedekatan masa mahupun kedekatan tempat dan tiada kesinambungan tindakan mahupun tujuan atau cara. Atas sebab ini, peraturan satu transaksi tidak akan terpakai. Oleh kerana kesalahan yang dilakukan adalah berasingan dan berbeza, hukuman harus dilaksanakan secara

berturut-turut (lihat perenggan 34).

(5) Mengenai hujahan perayu bahawa jumlah penjara 20 tahun penjara akan memberi kesan yang teruk kepada perayu, keseriusan kesalahan yang dilakukan dan tuntutan perlindungan kepentingan awam telah mengatasi kepentingan perayu. Kesalahan yang dilakukan oleh perayu memerlukan hukuman penjara yang panjang. Berkenaan hukuman sebatan, walaupun sejumlah 30 sebatan dikenakan ke atas perayu dan berdasarkan seksyen 288(5) Kanun Tatacara Jenayah ('KTJ'), perayu yang merupakan lelaki dewasa berumur 41 tahun telah dikenakan sebatan sehingga maksimum menurut undang-undang sebanyak 24 sebatan sahaja. PK telah mengenepikan hukuman sebatan untuk pertuduhan di bawah s 15 (a) (ii) AKSTKK. Baki bilangan sebatan adalah 27 sebatan. Mahkamah tidak akan mengubah 27 sebatan yang dikenakan oleh PK. Walau bagaimanapun, dalam melaksanakan hukuman sebatan, pihak berkuasa penjara perlu mengehadkan bilangan sebatan kepada 24 seperti yang dihadkan di dalam KTJ (lihat perenggan 38, 41 & 43).]

Cases referred to

Azman bin Mahedin v PP [2020] MLJU 1960; [2020] 1 LNS 1673, HC (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572; [2004] 3 AMR 429, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, FC (refd)
Dookes v Director of Public Prosecutions [2010] SCJ 71 (refd)
Ismail bin Jali v PP (Case No C-09(H)-76–02 of 2019) (unreported) (refd)
Lee Weng Tuck & Anor v PP [1989] 2 MLJ 143, SC (refd)
Loo Weng Fatt v PP [2001] 3 SLR 313, HC (refd)
Maliki bin Suratman v PP (Case No B-09-216–05 of 2019) (unreported) (refd)
Md Jahangir v PP [2020] 10 MLJ 210, HC (refd)
Muhammad Shahrani bin Muhammad Sani v PP [2021] MLJU 894; [2021] CLJU 720, HC (refd)
Mukhtar bin Ismail v PP (Case No D-09–507–10 of 2019) (unreported) (refd)
PP v Ahmad Hafizal bin Darusalam (Case No B-09(H)-269–06 of 2019) (unreported) (refd)
PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186; [1976] 1 LNS 116 (refd)
PP v Yap Huat Heng [1985] 2 MLJ 414; [1986] CLJ Rep 645 (refd)
PP v UI [2008] 4 SLR 500; [2008] 4 SLR (R) 500, CA (refd)
R v Ball (1951) 35 Cr App Rep 164 (refd)
Sulaiman bin Aswari v PP (Case No B-09–29–02 of 2020) (unreported) (refd)
Suresh a/l Karpaya lwn Pendakwa Raya [2022] MLJU 2023; [2022] 1 LNS 193, HC (refd)

Tuan Mat bin Tuan Lonik v PP [2009] 4 MLJ 81; [2009] 4 CLJ 638, CA (refd)
Yap You Jee v PP and other appeals [2015] 5 MLJ 334; [2015] 7 CLJ 897, CA (refd)

Legislation referred to

Criminal Procedure Code s 288, 288(5)
Sexual Offences Against Children Act 2017 ss 14, 14(a), 15(a)(ii), 16, 26, 27

Appeal from: *Ibrahim bin Mahd Nazri v Public Prosecutor* [2023] MLJU 1866 (High Court, Ipoh)

Mohamad Zaidan bin Daud (Hafizul, Munzeer & Zaidan) for the appellant.
Ng Siew Wee (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

Azmi Ariffin JCA:

CHRONOLOGY OF EVENTS

[1] The appellant was charged in the Sessions Court at Ipoh with seven counts, six offences under s 14(a) and (d) read together with s 16 of the Sexual Offences Against Children Act 2017 and one ('the SOACA') involving a victim who was 14 years at the material time under Criminal Case No AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 22022 and AA-62JSK-49–06 of 2022.

[2] Particulars of the charges were as follows:

COA Appeal: A-09(H)-186–08 of 2023

HC Appeal: AA-42JSKS-2–07 of 2022

(Sessions Court Case No: AA-62JSK-47–06 of 2022)

First Charge

Bahawa kamu pada 16.6.2022 jam lebih kurang 4.30 petang di tempat letak kereta Pasar Awam Kampar di dalam daerah Kampar di dalam sebuah kereta Perodua Alza AKX 410 telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual menyentuh payudara XXX yang berumur 14 tahun semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 14(a) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Terhadap Kanak-Kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

Second Charge

Bahawa kamu pada 16.6.2022 jam lebih kurang 4.30 petang di tempat letak kereta Pasar Awam Kampar di dalam daerah Kampar di dalam sebuah kereta

Perodua Alza AKX 410 telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual menggigit putting payudara kiri serta kanan XXX yang berumur 14 tahun semasa kejadian ang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Terhadap Kanak- kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

COA Appeal No: A-09(H)-189–08 of 2023

HC Appeal No: AA-42JSKS-5–07 of 2022

(Sessions Court Case No: AA-62JSK-48–06 of 2022)

First Charge

Bahawa kamu pada 17.6.2022 jam lebih kurang 12.30 tengahari di Pasaraya Lotus's, Jalan Aman, Taman Aman, di dalam daerah Kampar di dalam sebuah kereta Perodua Alza AKX 410 telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual menyelak baju dan menyentuh payudara XXX yang berumur 14 tahun semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 14(a) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Kesalahan Jenayah Seksual Terhadap Kanak-kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

Second Charge

yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Terhadap Kanak-kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

Third Charge

Bahawa kamu pada 17.6.2022 jam lebih kurang 12.30 tengahari di Pasaraya Lotus's, Jalan Aman, Taman Aman, di dalam daerah Kampar di dalam sebuah kereta Perodua Alza AKX 410 telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual memasukkan jari ke dalam kemaluan XXX yang berumur 14 tahun semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Terhadap Kanak-kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

COA Appeal No: A-09(H)-187–08 of 2023

HC Appeal No: AA-42JSKS-3–07 of 2022

(Sessions Court Case No: AA-62JSK-49–06 of 2022)

First Charge

Bahawa kamu pada 17.6.2022 jam lebih kurang 12.30 tengahari di Pasaraya Lotus's, Jalan Aman, Taman Aman, di dalam daerah Kampar di dalam sebuah kereta Perodua Alza AKX 410 telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual, mencium bibir XXX yang berumur 14 tahun

semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Terhadap Kanak-kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

Second Charge

Bahawa kamu pada 17.6.2022 jam lebih kurang 12.30 tengahari di Pasaraya Lotus's, Jalan Aman, Taman Aman, di dalam daerah Kampar di dalam sebuah kereta Perodua Alza AKX 410 telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual menyuruh XXX mengeluarkan lidah, yang berumur 14 tahun semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 15(a)(ii) dibaca bersama seksyen 16 Akta Kesalahan Jenayah Seksual Terhadap Kanak-kanak 2017 dan boleh dihukum di bawah seksyen yang sama.

[3] The appellant was also charged in the same court at Ipoh with three counts, offences under s 14(d) read together with s 16 of the Sexual Offences Against Children Act 2017 involving a victim who was 11 years at the material time under Criminal Case No AA-62JSK-50–06 of 2022.

COA APPEAL NO A-09(H)-188–08 OF 2023

HC APPEAL NO AA-42JSKS-4–07 OF 2022

(SESSIONS COURT CASE NO AA-62JSK-50–06 OF 2022)

[4] Particulars of the charges were as follows:

First Charge

Bahawa kamu pada 16.6.2022 jam lebih kurang 3.15 petang di ternpat letak kenderaan hadapan Sekolah Agama Rakyat As-Syuhada Bandar Baru Kampar di dalam daerah Kampar di dalam negeri Perak (di dalam sebuah kereta Perodua Alza AKX 410), telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual menyuruh YYY (yang berumur 11 tahun semasa kejadian) baring atas peha kamu yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan suatu kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan-Kesalahan Jenayah Seksual terhadap Kanak-Kanak 2017 (Akta 792) dan boleh dihukum di bawah seksyen yang sama.

Second Charge

Bahawa kamu pada 16.6.2022 jam lebih kurang 3.15 petang di tempat letak kenderaan hadapan Sekolah Agama Rakyat As-Syuhada Bandar Baru Kampar di dalam daerah Kampar di dalam negeri Perak (di dalam sebuah kereta Perodua Alza AKX 410), telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual menyentuh bibir YYY semasa baring atas peha kamu yang berumur

11 tahun semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan suatu kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan-Kesalahan Jenayah Seksual terhadap Kanak-Kanak 2017 (Akta 792) dan boleh dihukum di bawah seksyen yang sama.

Third Charge

Bahawa kamu pada 16.6.2022 jam lebih kurang 3.15 petang di tempat letak kenderaan hadapan Sekolah Agama Rakyat As-Syuhada Bandar Baru Kampar di dalam daerah Kampar di dalam negeri Perak (di dalam sebuah kereta Perodua Alza AKX 410), telah didapati melakukan amang seksual fizikal dengan cara bagi maksud seksual mencium bibir YYY semasa baring atas peha kamu yang berumur 11 tahun semasa kejadian yang mana kamu mempunyai hubungan amanah dengannya. Oleh itu, kamu telah melakukan suatu kesalahan di bawah seksyen 14(d) dibaca bersama seksyen 16 Akta Kesalahan-Kesalahan Jenayah Seksual terhadap Kanak-Kanak 2017 (Akta 792) dan boleh dihukum di bawah seksyen yang sama.

[5] These cases were tried together. Upon the ten charges being read to him, the appellant pleaded guilty to all the charges. He understood the nature and consequences of his plea. The facts of the case were tendered as exhibit along with another documentary evidence which was admitted as true by the appellant. He was convicted on the same. After hearing the mitigation from the appellant and the submission by the learned deputy public prosecutor for the respondent, the learned sessions court judge imposed the followings sentences:

Sessions Court Case No: AA-62JSK-47–06 of 2022

First Charge

Under section 14(a) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years supervision under section 27 SOACA and an additional 2 years imprisonment and 2 strokes of whipping under section 16 of the same Act.

Second Charge

Under Section 14(d) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years supervision under section 27 SOACA and an additional 2 years imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

Sessions Court Case No: AA-62JSK-48–06 of 2022

First Charge

Under section 14(a) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years of supervision under section 27 SOACA and an additional 2 years of imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

Second Charge

Under section 14(d) SOACA — 8 years imprisonment from the date of arrest, 1 stroke of whipping and 3 years supervision under s 27 SOACA; and an additional 2 years imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

Third Charge

Under section 14(d) SOACA — Imprisonment 8 years from the date of arrest, 1 stroke of whipping and 3 years of supervision under section 27 SOACA; and an additional 2 years of imprisonment and 2 strokes of whipping as provided under section 16 of the same Act

Sessions Court Case No: AA-62JSK-49–06 of 2022

First Charge

Under section 14(a) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years supervision under section 27 SOACA; and an additional 2 years imprisonment and 2 strokes of whipping under section 16 of the same Act.

Second Charge

Under section 15(a)(ii) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years supervision under section 27 SOACA; and an additional 2 years imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

Sessions Court Case No: AA-62JSK-50–06 of 2022

First Charge

Under section 14(d) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years of supervision under section 27 SOACA; and an additional 2 years of imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

Second Charge

Under section 14(a) SOACA — 8 years imprisonment from the date of arrest with 1 stroke of whipping and 3 years supervision under section 27 SOACA; and an additional 2 years imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

Third Charge

Under section 14(d) SOACA — 8 years of imprisonment from the date of arrest with 1 stroke of whipping and 3 years of supervision under section 27 SOACA; and an additional 2 years of imprisonment and 2 strokes of whipping as provided under section 16 of the same Act.

[6] The learned sessions court judge ordered that the sentences for all the

charges in cases AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022 and AA-62JSK-49–06 of 2022 are to run concurrently from the date of arrest.

[7] While the sentences for all three charges in case AA-62JSK-50–06 of 2022 to run concurrently after the sentences in cases AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022, and AA-62JSK-49–06 of 2022 are served.

[8] Dissatisfied, the appellant filed two separate notice of appeal dated 5 July 2022 (against sentence) and 7 July 2022 (against conviction and sentence) to the High Court.

[9] On 21 July 2023, the learned judicial commissioner having heard these appeals together, dismissed the appellant's appeal against conviction.

[10] As for the sentence, the learned judicial commissioner set aside the sentence of whipping in respect of the second charge for the offence under s 15(a)(ii) SOACA in Case No AA-62JSK-49–06 of 2022. The learned judicial commissioner also reduced the sentence of the said charge of the same case to three years imprisonment. The sentence of imprisonment in respect of all other cases was affirmed. The learned judicial commissioner also maintained the order of the sessions court as to how the sentence of imprisonment should be carried out.

[11] Aggrieved, the appellant filed an appeal before us only against sentence. Hence, there are four related appeal before this honourable court for determination ie (A-09(H)-186–08 of 2023, A-09(H)-187–08 of 2023, A-09(H)-188–08 of 2023 and A-09(H)-189–08 of 2023).

BRIEF FACTS

[12] The victims were two sisters, ages 11 and 14, who were sexually assaulted separately. The facts of the case were briefly laid out by the learned trial judge in her grounds of judgment which is reproduced herein:

> Sessions Court Case No AA-62JSK-47–06 of 2022), AA-62JSK-48–06 of 2022 and AA-62JSK-49–06 of 2022:
>
> > Pengadu dalam kes ini ialah ibu kepada mangsa. Mangsa ialah seorang kanak kanak perempuan berumur 14 tahun. Pada 19.6.2022, jam lebih kurang 11 malam, semasa pengadu dirumah, anak sulungnya memaklumkan seorang lelaki yang dikenali dengan nama pakcik Ibrahim telah melakukan perbuatan tidak senonoh kepada adik-adiknya iaitu anak pengadu yang kedua dan yang ketiga. Kedua-dua anaknya itu kemudiannya menceritakan kepadanya apa yang dilakukan oleh lelaki tersebut kepada mereka. Lelaki yang dikenali sebagai pakcik Ibrahim itu merupakan jiran mereka dan telah dibayar oleh pengadu untuk menghantar dan mengambil anak-anaknya pergi dan balik sekolah sejak

tahun 2021. Pengadu terus membuat laporan polis sebagaimana Kampar repot 2031/22.

Berdasarkan laporan polis yang dibuat oleh pengadu, pihak polis telah menangkap Tertuduh iaitu Ibrahim bin Mahd Nazri pada 20.6.2022 (tarikh tangkap) di tepi Jalan Stesen, Kampar. Turut bersama dirampas ialah kereta Perodua Alza AKX 410. Tertuduh selanjutnya dituduh di mahkamah ini pada 28.6.2022

Sessions Court Case No AA-62JSK-50–06 of 2022

Pengadu dalam kes ini ialah ibu kepada mangsa. Mangsa ialah seorang kanak-kanak perempuan berumur 11 tahun. Pada 19.6.2022, jam lebih kurang 11 malam, semasa pengadu dirumah, anak sulungnya memaklumkan seorang lelaki yang dikenali dengan nama pakcik Ibrahim telah melakukan perbuatan tidak senonoh kepada adik-adiknya iaitu anak pengadu yang kedua dan yang ketiga. Kedua-dua anaknya itu kemudiannya menceritakan kepadanya apa yang dilakukan oleh lelaki tersebut kepada mereka. Lelaki yang dikenali sebagai pakcik Ibrahim itu merupakan jiran mereka dan telah dibayar oleh pengadu untuk menghantar dan mengambil anak-anaknya pergi dan balik sekolah sejak tahun 2021. Pengadu terus membuat laporan polis sebagaimana Kampar repot 2031/22 ('Eksibit P2'). Mangsa di dalam kes ini merupakan anak pengadu yang ketiga.

Berdasarkan laporan polis yang dibuat oleh pengadu, pihak polis telah menangkap Tertuduh iaitu Ibrahim bin Mahd Nazri pada 20.6.2022 (tarikh tangkap) di tepi Jalan Stesen, Kampar. Turut bersama dirampas ialah kereta Perodua Alza AKX 410. Tertuduh selanjutnya dituduh di mahkamah ini pada 28.6.2022.

The relevant provisions of law:

(a) s 14 of the Sexual Offences Against Children Act 2017:

14 Physical sexual assault on a child Any person who, for sexual purposes —

(a) touches any part of the body of a child;

(b) makes a child touch any part of the body of such person or of any other person;

(c) makes a child touch any part of the child's own body; or

(d) does any other acts that involve physical contact with a child without sexual intercourse, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be liable to whipping.

(b) s 16 of the Sexual Offences Against Children Act 2017:

16 Person in a relationship of trust

(1) If a person who commits any offence under this Act or any offence

specified in the Schedule against a child, is in a relationship of trust with the child, such person shall, in addition to the punishment to which he is liable for such offence, be punished with imprisonment for a term not exceeding five years and shall also be punished with whipping of not less than two strokes.

(2) In this section, a person is said to be in a relationship of trust with a child if the child is under his care, supervision or authority, including but not limited to —

(a) a parent, guardian or person who is related through full-blood or half-blood, or through marriage or adoption, including de facto adoption;

(b) a person who looks after one or more children for valuable consideration for any period of time;

(c) a teacher, lecturer or warden of a kindergarten, school, public institution of higher learning or private institution of higher learning;

(d) any person providing healthcare services in a Government healthcare facility or private healthcare facility as defined in section 2 of the Private Healthcare Facilities and Services Act 1998 [Act 586];

(e) a coach; and

(f) a public servant of whatever rank in the course of his duty under any written law in respect of the child.

(c) s 15(a)(ii) of the Sexual Offences Against Children Act 2017:

15 Non-physical sexual assault on a child Any person who —

(a) for sexual purposes —

(ii) makes a child exhibit the child's body or any part of the child's body so as it is seen by such person or any other person; or commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding twenty thousand ringgit or to both.

(d) s 26 of the Sexual Offences Against Children Act 2017:

26 Rehabilitative counselling

(1) The court may, in addition to any punishment imposed for any offence under this Act, or any offence specified in the Schedule where the victim is a child, order period of rehabilitative counseling on the person convicted of such offence within the period of his detention.

(2) The rehabilitative counselling ordered under subsection (1) shall be under the Minister charged with the responsibility for prison.

(e) s 27 of the Sexual Offences Against Children Act 2017:

27 Police supervision

(1) Notwithstanding subsection 295(1) of the Criminal Procedure Code,

whether or not he has previously been convicted of any offence, when a person is convicted of any offence under this Act, or of any offence specified in the Schedule where the victim is a child, the court shall direct that he be subject to the supervision of the police for a period of not less than one year and not more than three years commencing immediately after the expiration of the sentence passed on him.

(2) When any person subject to the supervision of the police under subsection (1) is, while still subject to such supervision, sentenced to a term of imprisonment within Malaysia, any term spent in prison shall be excluded from the period of supervision.

OUR DECISIONS

[13] On the question of conviction and sentence, this is what the learned judicial commissioner said:

> [29] Next, should this court interfere with the learned SCJ's sentences in cases AA-42JSKS-2–07 of 2022, AA-42JSKS-4–07 of 2022, and AA-42JSKS-5655–07 of 2022? The courts have long held that an appellate court should not interfere with sentences meted out by trial judges, even if another court would have imposed a different sentence. The trial judge was not exercising discretion in an unauthorised, extraneous, or irrelevant manner and therefore this court should refrain from interfering in matters that do not warrant interference.
>
> [30] As such, this court will not interfere with the sentencing by the learned SCJ as she did not exercise discretion in an unauthorised, extraneous, or irrelevant manner.
>
> [31] The other complaints of the appellant of the purported errors of the learned SJC namely, failure to take notice from the admission of guilt to a serious offence that the appellant did not have full understanding of the nature and consequence of his admission to the offence; failure to make any effort to ask relevant questions in relation to the charges against the appellant before accepting a guilty plea; failure to take into account of the quickness of which the appellant's guilty plea was recorded ie 8 days from the date of arrest and at the first instant he was presented in court after being under remand; failure to notice whether the appellant truly intended to plead guilty to the offence and whether the learned SCJ should have accepted the guilty plea in such circumstances without any legal representation.
>
> These complaints by the appellant are without merit, as the accused/appellant was asked if he was represented. There is no duty upon the court or the learned SCJ to insist upon legal representation for the appellant. Unless there were complaints of external interference that led to the appellant's guilty plea, there is no error on the part of the learned SCJ in accepting the guilty plea from the appellant/ accused.
>
> The submission by the appellant that the learned SCJ rushed into recording the appellant/accused guilty plea merely because it was eight days after his arrest is without merit. There must be evidence or complaints of something that the learned SCJ failed to adhere to prior to accepting the guilty plea of the appellant. Save for those complaints raised by the appellant counsel in this case, which I have considered and found no merit, there is no other allegation of external interference.

The learned SJC only proceeded to record and accept the guilty plea of the appellant after ensuring the 'fakta kes' and exhibits were ready and the same were shown and read to the appellant, who confirmed that he understood them.

[33] As I previously stated, the appellant is Malay, and the language used by the court through the court interpreter to read out loud the charge sheet, 'fakta kes' and exhibits were in Bahasa Malaysia and the important thing to note is that after being read to the appellant, he confirmed to the court that he understood them. With that said, the learned SCJ had no doubt that the appellant pleaded guilty with full knowledge of the true nature and consequences of the offence for which he was charged, convicted, and sentenced.

[34] For the reasons above stated, all appeals on conviction by the appellant are struck out by reason of s 305 of the CPC and though I have considered them by exercise of revisionary jurisdiction under s 34 of the CJA 1964 and s 325 of the CPC, I still have no basis to set aside the conviction. Insofar as the sentence is concerned, I hereby set aside the sentence of whipping in respect of the second charge for the offence under s 15(a)(ii) of the SOACA, in Case No AA-62JSK-49–06 of 2022, which is registered in this court as Appeal No AA-42JSKS-3–07 of 2022. In respect, of the sentence of imprisonment also in respect of the second charge of the same case, I reduce to three years imprisonment. As for how the sentence should be carried out, it will be the same as what the lower court had ordered, which I affirm here. For the avoidance of doubt, the decision of the learned SCJ is affirmed as to the conviction and sentence in all other cases, excluding those convictions and sentences that were set aside and reduced by this court.

[14] As regards conviction, we see no necessity for a detailed discussion on the evidence presented. It is covered in the reasons of the trial court and high court in a manner which we find convincing. Our decisions will therefore be brief.

[15] We agree with the learned judicial commissioner assessment and finding that the appellant understood the nature and consequences of his guilty plea. We see no justification to disturb his decision on this point. Further, there was no evidence of the appellant making any form of qualified admission to the commission of the offence or any evidence that may impair the plea of guilt. Everything that took place before the lower court was in accordance with the procedure and principles laid down in *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143. The principles can be summarised as follows:

(a) that the accused intended to plead guilty;

(b) that the accused understood the true nature of the plea and the consequences; and

(c) that the accused intended to submit to the offence without qualification.

[16] On sentence, after considering the facts from the notes of proceedings

which requires no repetitions, mitigation and the seriousness of the offence, we unanimously find that the sentence imposed by learned judicial commissioner is not manifestly excessive or inadequate. We now give our reasons.

[17] An appellate court will not interfere in the trial judge's exercise of sentencing discretion, unless it is shown that the judge had erred in principle, or that the sentence is either manifestly inadequate or grossly excessive. This principle was reiterated by the Court of Appeal in *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869, where it was held that an appellate court in dealing with an appeal against sentence may only interfere in limited circumstances, where:

(a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentence;

(b) there had been an error on the part of the trial judge in appreciating the material facts placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or inadequate.

(See *R v Ball* (1951) 35 Cr App Rep 164 *Loo Weng Fatt v Public Prosecutor* [2001] 3 SLR 313 at para [65]; *Public Prosecutor v UI* [2008] 4 SLR 500; [2008] 4 SLR (R) 500).

In similar vein, the Court of Criminal Appeal in *Dookes v Director of Public Prosecutions* [2010] SCJ 71 said at para 177:

> ... sentencing is not a science of mathematical application of any set formula. It is a normative science rather than a physical science which takes into account the circumstances of the offender as well as the offence and the impact of the offence on the community. A sentence may look to be lenient because it is tailored to fit the offender, the offence and the offended but, in our system of justice, the trial court is the only constitutional institution which is empowered and sovereign in determining which sentence to impose on an offender on the facts of the particular case. An appellate court would scarce intervene unless the sentence is wrong in principle or manifestly harsh and excessive or unduly lenient. However, even if there is nothing wrong with the principle, the sentence may be increased by the appellate court if it is unduly lenient. The principle of proportionality pervades through the whole system of justice, in procedure, substance and sanctions.

[18] In *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139, Raja Azlan Shah Ag LP (as His Royal Highness then was) had offered guideline in dealing with appeals against sentence:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in

him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore, sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest (see the *Exclusive Brethren case* [1980] 3 All ER 161 at p 172).

[19] Based on the authorities mentioned above, we find that the sentence meted out by the learned sessions court judge (affirmed by the learned judicial commissioner) is proportional to the commission of the beastly act by the appellant on the children. Considering the alarming increase of sexual offences against children, deterrence has to be the sole aim. Sentence passed shall be deterrent to the appellant specifically so that he would not re-offend and likewise it has to be a clear message to would be offenders, to be deterred from committing such crimes.

[20] It is beyond doubt that the utmost factor to be taken into consideration is public interest. Circumstances that mitigate the crime such as hardship to the offender and family members if he were sent to long incarceration should not be given undue weight in assessing sentence. The severity of the offence herein outweighs the needs and interest of the appellant particularly in regard to offences of a sexual nature such as in this case.

[21] The appellant cannot be allowed to commit an offence only to hide behind the possible repercussions of a lengthy custodial sentence on his family to lighten the sentence imposed. No doubt the appellant has played significant

parts in caring for various members of his family, and no doubt his absence will be difficult to his family.

[22] Sad to say, the appellant only has himself to blame for that and he should live with the consequences of his own fault. Reference is made to the case of *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186; [1976] 1 LNS 116 where the court had this to say:

> The respondent also puts forward in his plea in mitigation the fact that he is employed and supports an aged mother and step-brothers. He should of course have thought of this before committing the offences and not after; he is in fact pleading hardship arising from the consequences of his own acts and I would reiterate what I had occasion previously to observe in another case that an offender should not expect to excite or harness any sympathy on an ipse dixit by taking the stance of the impetuous youth who killed his parents with an axe and then pleaded in mitigation that he was an orphan. In any event from the probation report it would appear that his family is certainly not without other means of support. The respondent further undertakes to turn over a new leaf, as he puts it. That is as it should be and he should certainly do so but only after the proper and necessary correction has been administered to him in accordance with established principles of law for the offences under consideration in this matter.

TREND OF SENTENCING

[23] In *Maliki bin Suratman v Public Prosecutor* (Case No B-09–216–05 of 2019) (unreported), the Court of Appeal on 10 March 2022 had found that the sentence of ten years imprisonment imposed against the accused who had touched the child's breast and private part. In this case, the accused was 68 years old and the child was 15 years old at the material time.

[24] In *Ismail bin Jali v Public Prosecutor* (Case No C-09(H)-76–02 of 2019) (unreported), the Court of Appeal on 27 January 2022 had affirmed the sentence of ten years imprisonment and three strokes against the accused who had touched the child's breast. In this case, the accused was 56 years old and the child was 14 years old at the material time.

[25] In *Sulaiman bin Aswari v Public Prosecutor* (Case No B-09–29–02 of 2020) (unreported), the Court of Appeal on 26 October 2021 had affirmed the sentence of 14 years imprisonment and five strokes of whipping imposed against the accused who had touched, licked and inserted his finger into the child's private part. In this case, the accused was 41 years old and the child was eight years old at the material time.

[26] In of *Mukhtar bin Ismail v Public Prosecutor* (Case No D-09–507–10 of 2019) (unreported), the Court of Appeal on 1 October 2020 had affirmed the

sentence of 11 years imprisonment imposed against the accused who had touched the child's breast and private part. In this case, the accused was 64 years old and the child was 15 years old at the material time.

[27] In *Public Prosecutor v Ahmad Hafizal bin Darusalam* (Case No B-09(H)-269–06 of 2019) (unreported), the Court of Appeal on 18 February 2020 had affirmed the sentence of 12 years imprisonment and four strokes of whipping imposed against the accused who had inserted his finger into the child's private part. In this case, the accused was 25 years old and child was eight years old at the material time.

[28] In *Md Jahangir v Public Prosecutor* [2020] 10 MLJ 210, Mohd Nazlan Mohd Ghazali J (as he then was) held as follows:

> [54] My own research shows that the punishment recorded in recent cases for Section 14 offences include *Mohamad Izzaini bin Zainudin v Public Prosecutor* [2019] 7 MLJ 366 where the sentence was a jail term of seven years and one stroke of whipping for each of the three charges, *Helerryak Bungkok v Public Prosecutor* [2019] 10 MLJ 308; [2019] 1 LNS 315 where the imprisonment was for ten years, accompanied with two strokes of whipping for each of the two charges under s 14(d) and *Razali bin Silah v Public Prosecutor* [2019] 12 MLJ 205; [2019] 1 LNS 1508, where a jail term of four years and one stroke of whipping was ordered by the court.
>
> ...
>
> [59] In my judgment, the sentence meted out against the appellant-of six years' imprisonment from the date of arrest and two strokes of whipping is in consonance with a careful attempt to strike a balanced determination of the most proportionate, fair and appropriate punishment for the appellant for having pleaded guilty to the commission of the offence under s 14(a) of the Sexual Offences Against Children Act 2017.

[29] In *Azman bin Mahedin v Public Prosecutor* [2020] MLJU 1960; [2020] 1 LNS 1673, Dr Hj Alwi Hj Abdul Wahab J held as follows:

> [26] The relevant case law for consideration is the case of *Public Prosecutor v Mad Salleh Naif* [2019] 5 LNS 16 where the accused in that case was charged under the same section of Act 792 as in the instant appeal. In that case, the accused pleaded guilty for the offence of touching, kissing and licking the victim's private part and was sentenced to five years imprisonment with two strokes of whipping.

[30] In *Muhammad Shahrani bin Muhammad Sani v Public Prosecutor* [2021] MLJU 894; [2021] CLJU 720 Aslam Zainuddin JC (as he then was) held as follows:

> [1] The appellant was found guilty by the Sessions Court below on two charges under s 14 of the Sexual Offences Against Children Act 2017 and s 377B of the

Penal Code respectively and was sentenced to ten years imprisonment and ordered to be whipped with two strokes of the rotan on each charge. The imprisonment term was ordered to run concurrently from 14 June 2019.

[17] An appellate court will not interfere with the sentence imposed by the court below unless it is shown that the sentence imposed was unreasonable or manifestly excessive.

[18] Based on the above case law, I reduced the sentence of the accused on both the charges from ten to eight years imprisonment and for Case Number WA-42JSKS-6–07 of 2019 I reduced the whipping from two to one stroke. Both the imprisonment sentences were ordered to run concurrently.

[31] In *Suresh a/l Karpaya lwn Pendakwa Raya* [2022] MLJU 2023; [2022] 1 LNS 193 Abu Bakar Katar J held as follows:

[2] Perayu tidak mengaku bersalah atas pertuduhan dan telah diwakili peguamnya iaitu Tetuan Amarpreet Singh & Co. Perbicaraan penuh telah dijalankan di hadapan Tuan Hakim, Mahkamah Sesyen, Johor Bahru, Johor ('Tuan HMS itu'). Di akhir perbicaraan Tuan HMS itu memutuskan Perayu bersalah dan disabitkan atas pertuduhan s 14(a) Akta Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('Akta itu'). Tuan HMS itu telah menjatuhi hukuman penjara enam tahun mulai tarikh sabitan (21 Oktober 2021) dan dua sebatan rotan.

[3] Perayu yang terkilan dengan keputusan Tuan HMS itu telah memfailkan Notis Rayuan ke Mahkamah Tinggi, Johor Bahru atas sabitan dan hukuman (Rekod Rayuan) (RR) (Jld 1) (muka surat (2)–(4)). Mahkamah ini telah mendengar rayuan perayu, di akhir pendengaran mahkamah ini menolak rayuan perayu atas sabitan dan hukuman yang dijatuhi oleh Tuan HMS itu disahkan.

TOTALITY PRINCIPLE/CRUSHING EFFECT

[32] In *Tuan Mat bin Tuan Lonik v Public Prosecutor* [2009] 4 MLJ 81; [2009] 4 CLJ 638, the Court of Appeal speaking through Suriyadi Halim Omar JCA (as he then was), in a great detail judgment held as follows:

[13] When this panel imposed the above sentences, we had to consider several factors but due to the factual matrix of the case, the factor of public interest was uppermost in our mind. Public interest varies with place, time and circumstances of each case including the age of the offender and the prevalence of the offence. A certain type of sentence may not satisfy public interest at another place (*New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27; [1982] CLJ Rep 606). The sentence must be deterrent enough, in that the prisoner will realise crime does not pay, with the punishment being debilitating to his freedom. Not only will would-be offenders be deterred from trying but so will it deter repeat offenders (*Rex v Kenneth John Ball* (1951) 35 Cr App Rep 164.

[14] The concept of retribution akin to 'tooth for a tooth', normally takes front stage if the offence is considered an offence against a member of the public, especially here when a step-daughter has been raped repeatedly since of tender age. Due to the

special relationship here between the victim and the appellant, let alone the rape incidents were repeatedly carried out until an illegitimate child was born, the demand to satisfy society's needs to avenge the wrongful act of the appellant must take centre stage.

...

[16] Likewise it was also timely that we show our abhorrence of incestuous rape and impose the appropriate sentence in the circumstances of the case. Despite the above supplied facts and prognosis, this panel did not go overboard by ignoring the law or even rationality, and impose impossible sentences. We had occasion to remark in open court that judges should not be blinded by emotion and react emotionally as the law is not as evil as the appellant. In the circumstances of the case, anything less than 30 years in jail would not suffice to qualify as retributive, hence that span of time ordered against the appellant.

[19] In the circumstances of the case, a lenient sentence, or reformative sentences may not be suitable.

[20] The appellant here had pleaded guilty to all the despicable offences committed during those years, when the stepdaughter was his ward. Even though a plea of guilt is a mitigating factor, and some credit or discount is normally given, not all pleas of guilt may be accorded that privilege. A court has the discretion not to entertain such discounts (*Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; [1975] 1 LNS 158 *Melvani v Public Prosecutor* [1971] 1 MLJ 137; [1971] 1 LNS 78 *Public Prosecutor v Sulaiman Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ Rep 447 *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; [1992] 1 LNS 47). It is widely known that incest statistically appears to be on the rise, with the victim getting younger by the day, as reported daily by the local media. And no amount of consensual defence will be accepted, be it on ground of religion, morality, or law. With the facts as they were, let alone public interest demands a retributive and deterrent sentence, discounts are not appropriate here (*Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370 *Public Prosecutor v Dato' Nallakaruppan Solaimalai* [1999] MLJU 74; [1999] 2 CLJ 596).

[21] The appellant is the authority in the household, and every member of the family would inevitably look up to him, not only for guidance, but also protection. Unfortunately, the trust was betrayed when he took advantage of his power of strength by regularly forcing himself on the victim.

...

[24] An appellate court will not be overly ready to interfere with any sentence imposed by the trial court unless there are very good reasons to do so. For purposes of this case, suffice if we merely peruse the sentences meted down, subsequently to be affirmed by the High Court, from the point of view of logic. It is statistically accepted that the average life span of a Malaysian man is 70 years whilst that of a Malaysian woman 75 years. In time the average life span will increase. That being so, with the appellant now 48 years old, on average he has 22 years of good life left. To impose a sentence that will take him until the age of 123 years old, and knowing fully well that he never will serve the full term, not only is bizarre but strains the intelligence of the court. Any illogical sentence may attract unnecessary scrutiny

A and negative comments from the public on how we awkwardly conduct ourselves.

[25] With the sentences of the first and second charges to run consecutively, thus factually reducing the length of time of incarceration to 30 years, and with deductions thrown in for good behavior, by the time he is released he will be about 70 years of age ie, the average life of a Malaysian man. Even if he lives to smell freedom at that age the likelihood of him besetting and causing trauma to anyone is slim. Our orders not only have taken public interest into account but also made the sentence sensible and fair.

B

...

C [29] Based on all the above reasons we allowed the appeal. We varied the High Court order as we refused to submit to public opinion; public opinion is like the sword of Damocles that hover over the head of any trial judge, constantly intimidating the court to surrender to the unreasonable demands of the public.

D **[33]** Having examined the relevant case law on the principles in regard to consecutive and concurrent sentences and the 'crushing effect' on the appellant, unfortunately this court is not swayed by the appellant's submissions. In our view, the total of 20 years imprisonment did not go against the totality principle because the maximum sentence that could be imposed for all the ten offences is 200 years. The rationale given by the sessions court judge was that the court must show its abhorrence to the rampancy of crimes of a sexual nature committed against children and therefore, a deterrent sentence was warranted. We agree that the facts and circumstances of the case did not justify a shorter term of imprisonment nor was it fit to impose concurrent sentences. We are of the considered view that these are very serious and heinous crimes indeed.

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[34] From the charges preferred against the appellant, it is clear beyond doubt that the charges in cases AA-62JSK-47–06 of 2022, AA-62JSK-48–06 of 2022 and AA-62JSK-49–06 of 2022 are distinct from the charges in AA-62JSK-50–06 of 2022. The time, place of incidents and victims were different. It is clear that there is no proximity of time nor proximity of place. There is obviously no continuity of action nor purpose or design. For this reason, the one transaction rule would not apply to this case. The offences committed are separate and distinct, the sentences should be made to run consecutively. Reference is made to the case of *Public Prosecutor v Yap Huat Heng* [1985] 2 MLJ 414; [1986] CLJ Rep 645, Shaik Daud Ismail J (as he then was) stated that:

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... Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted or a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.

[35] In *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572; [2004] 3 AMR 429, the Court of Appeal through the judgment delivered by Augustine Paul JCA (as he then was) said:

> ... combined effect of s 282 and s 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v Public Prosecutor* [1990] 1 MLJ 88; [1990] 1 CLJ 435; [1990] 1 CLJ Rep 223). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* [1964] Crim LR 482 *R v Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; [1979] 1 LNS 36; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] MLJ 236; [1955] 1 LNS 17).

[36] Srimurugan Alagan in his book title *The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure* (2nd Ed, Sweet & Maxwell)' at pp 461–462 said as follows:

> In deciding whether the terms of imprisonment should be consecutive or commence at another date, the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* [1964] Crim LR 482; *R v Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 236; [1979] 1 LNS 36).

[37] In *Yap You Jee v Public Prosecutor and other appeals* [2015] 5 MLJ 334; [2015] 7 CLJ 897, the Court of Appeal held as follows:

> In respect of the second and third appellants, in determining whether the sentences should be concurrent or consecutive, we are guided by the one transaction rule where four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572; [2004] 3 AMR 429.

[38] The appellant's complaint that the total imprisonment of 20 years imprisonment would have a crushing effect on him. With respect, we are of the view that due to the nature and gravity of the crimes committed, public interest

would be better served by keeping the appellant away from the victim and society at large for a longer period of time. Even though the appellant has to face a very long term of imprisonment before he will be released and the sentences imposed will have a crushing effect on the appellant, the seriousness of the offences committed and the demand of protection of the public interest forfeited the interest of the appellant. The offences committed by the appellant warrants a lengthy imprisonment sentence. Hence, we agree with the rationale of the sessions court judge in imposing these sentences consecutively against the appellant.

[39] We also find ourselves in agreement with the learned deputy public prosecutor contention that the learned sessions court judge had not lose sight of the fact that the court has a duty to protect young children from unscrupulous men such as the appellant always on the prowl to take sexual advantage of minor, and in this case vulnerable children who were entrusted to him by the girls' parent by ferrying them to and from school. In the larger interest of the public, his detention for a substantial period is necessary to protect the public from his criminal behaviour.

[40] For the ease of reference, the relevant passages in the grounds of judgment delivered by the learned sessions court judge (affirmed by the learned judicial commissioner) are reproduced herein:

> 15. Kepentingan awam juga menuntut pesalah-pesalah seperti tertuduh ini diasingkan dari masyarakat untuk tempoh yang panjang supaya masyarakat berasa selamat dan aman. Dalam kes ini, tertuduh telah diamanahkan oleh ibubapa mangsa untuk menghantar dan mengambil mangsa dari sekolah tetapi, tertuduh telah mengkhianati amanah itu dengan melakukan amang seksual fizikal terhadap mangsa. Perbuatan tertuduh bukan setakat menyentuh bahagian tubuh mangsa tetapi juga berbentuk invasive dimana tertuduh telah memasukkan jari ke dalam kemaluan mangsa. lni secara tidak langsung juga adalah satu bentuk sexual grooming kepada kanak-kanak. Jadi, seharusnya hukuman berbentuk deterrent diberikan supaya dapat mencegah tertuduh dari mengulangi kesalahan yang sama dan sebagai peringatan kepada mana-mana orang lain yang berkemungkinan berniat melakukan jenayah seksual bahawa inilah hukuman yang akan diterima sekiranya melakukan kesalahan yang sama. Bagi mencapai tujuan ini, hukuman yang diberikan haruslah berbentuk pemenjaraan yang panjang bersama dengan sebatan yang tinggi supaya dapat mendatangkan kegerunan kepada mana-mana bakal pesalah yang lain. Oleh itu, saya percaya penjara selama 10 tahun adalah tempoh yang munasabah sebagai hukuman kepada tertuduh demi mencerminkan keseriusan jenayah yang dilakukan dan menjaga kepentingan awam.
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> 16. lni adalah selaras dengan prinsip yang dinyatakan di dalam kes *Public Prosecutor v Sainin Sidon* [2009] 3 CLJ 181 iaitu; 'The courts as guardian of public interest must deal properly with evildoers. Otherwise, the public will be led into thinking that the courts are placing the interest of criminals above the interest of the public'.
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> 17. Selain itu, dalam menjatuhkan hukuman kepada tertuduh, saya juga melihat

kepada fakta kes iaitu bagaimana jenayah ini dilakukan. Berat sesuatu hukuman itu adalah ditentukan oleh keseriusan jenayah yang telah dilakukan. Formula ringkas, semakin berat jenayah yang dilakukan, maka semakin berat hukuman yang akan dijatuhkan.

18. Dalam kes ini, berdasarkan fakta kes, jelas ia adalah satu jenayah yang dirancang. Tertuduh sepatutnya menghantar dan mengambil mangsa dari sekolah, tetapi sebaliknya, tertuduh telah membawa mangsa ke kawasan tempat kereta pasar awam dan pasaraya Lotus untuk melakukan perbuatan terkutuk tersebut. Ia bukannya jenayah yang dilakukan secara tiba-tiba kerana ada peluang tetapi adalah jenayah yang dirancang memandangkan tertuduh tahu jadual pergi-balik mangsa dari sekolah. Ia juga dilakukan selama dua hari berturut-turut, jadi hanya ada satu inferens yang boleh dibuat iaitu, bahawa tertuduh sememangnya telah berniat dan merancang untuk melakukan perbuatan amang seksual fizikal terhadap mangsa pada hari kejadian.

19. Selain itu, saya juga mengambilkira hubungan di antara tertuduh dengan mangsa. tertuduh telah diamanahkan dan dibayar oleh ibubapa mangsa untuk menghantar dan mengambil mangsa dari sekolah tetapi beliau menggunakan kesempatan itu untuk melakukan jenayah seksual terhadap mangsa yang hanya merupakan seorang kanak-kanak. Betapa terkutuknya perbuatan tertuduh terhadap mangsa yang tidak boleh mempertahankan diri dan masih mentah. Tertuduh mempunyai isteri yang sah jadi, tiada keperluan untuknya melampiaskan nafsunya kepada kanak-kanak perempuan melainkan beliau memang mempunyai kecenderungan kepada sifat pedofilia. Inilah yang berbahaya kepada masyarakat jika tidak dibendung dari berterusan. Justeru, inilah yang mewajarkan hukuman pemenjaraan yang panjang kepada tertuduh.

20. Walaupun tertuduh telah mengaku salah terhadap pertuduhan, dalam kes seserius ini, ia bukanlah satu faktor mitigasi yang bermerit. Keseriusan kes ini yang melibatkan jenayah seksual terhadap seorang kanak-kanak perempuan menenggelami sebarang faktor mitigasi yang ada. Begitu juga dengan faktor bahawa tertuduh merupakan seorang pesalah pertama, ia tidak menjadikan tertuduh berhak secara automatik kepada sebarang pengurangan hukuman kerana keseriusan jenayah yang telah dilakukan.

21. Tertuduh dalam rayuannya memohon hukuman ringan atas alasan telah menyesal dan menanggung keluarga yang terdiri dari tiga anak dan seorang isteri yang sedang mengandung tujuh bulan. Walaupun mahkamah bersimpati dengan keluarganya yang akan hilang tempat bergantung sepanjang beliau di penjarakan tetapi kepentingan peribadi tertuduh tidak boleh diberi kepentingan melebihi daripada kepentingan awam. Jikalau tidak, masyarakat akan memandang rendah institusi kehakiman kerana menjaga kepentingan peribadi tertuduh lebih dari kepentingan awam walhal tertuduh telah disabitkan dengan kesalahan jenayah yang sangat serius. Tambahan pula, tertuduh seharusnya memikirkan tentang keluarganya sebelum melakukan jenayah tersebut; sesal dahulu pendapatan, sesal kemudian tidak berguna.

22. Prinsip bahawa keseriusan jenayah menenggelami mitigasi pengakuan salah telah dinyatakan dengan jelas dalam kes *Public Prosecutor v Govindnan Chinden Nair* [1998] 2 MLJ 181; [1988] 2 CLJ 370

> An accused person should be given credit or discount for pleading guilty, but the severity of the offence committed may outweigh the mitigating effect of a guilty plea. Thus, there can be no automatic rule that a guilty plea on its own entitles an accused person to a lesser punishment.
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> 23. Jenayah seksual terhadap kanak-kanak kerap berlaku kebelakangan ini sehingga Parlimen terpaksa menggubal Akta Jenayah Seksual Terhadap Kanak-kanak 2017 ini sebagai usaha menangani jenayah ini dari berterusan. Ianya adalah untuk melindungi golongan kanak-kanak yang sering manjadi mangsa mudah bagi jenayah seksual dan bagi menghukum sekeras-kerasnya pesalah-pesalah yang telah disabitkan. Berita tentang jenayah seksual terhadap kanak-kanak ini sangat kerap dilaporkan di akhbar dan media sosial yang lain. Jadi, saya juga mengambilkira faktor kekerapan berlakunya jenayah ini dalam menjatuhkan hukuman berbentuk deterrent kepada tertuduh sebagai peringatan kepada orang awam dan bagi menunjukkan keseriusan mahkamah dalam membanteras jenayah ini dari berterusan.

[41] As regard the sentence of whipping, notwithstanding a total number of 30 strokes were imposed on the appellant and by virtue of s 288(5) of the Criminal Procedure Code, the appellant being a male adult of 41 years old is subjected to be whipped up to a statutory maximum of 24 strokes only. The learned judicial commissioner had set aside the sentence of whipping imposed in respect of the charge under s 15(a)(ii) of the SOACA. The remaining number of whipping is 27 strokes.

[42] Section 288 of the Criminal Procedure Code provides as follows:

> 288(1) When the accused is sentenced to whipping the number of strokes shall be specified in the sentence. In no case shall the whipping exceed twenty-four strokes in the case of an adult or ten strokes in the case of a youthful offender, anything in any written law to the contrary notwithstanding.
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> ...
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> (5) When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by whipping, the combined sentences of whipping awarded by the Court of any such offences shall not, anything in any written law to the contrary notwithstanding, exceed a total number of twenty-four strokes in the case of adults and ten strokes in the case of youthful offenders.

[43] Even though we are well aware of the above provision, yet on record we will not varied the 27 strokes meted out by the learned judicial commissioner. Be that as it may, we think it is still appropriate to remind that in executing the whipping sentence, the prison authority will have to caps the number of strokes to 24 only to bring it within the limit mandated by the Criminal Procedure Code.

CONCLUSION

[44] We find no merits in the appeal that warrant appellate intervention. For all the reasons stated above, we unanimously dismissed the appeal and affirmed the conviction and sentence handed down by the learned judicial commissioner.

Appeal dismissed.

Reported by K Selvaraju